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No. 90-144

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

SAFE FLIGHT INSTRUMENT CORPORATION,
Petitioner,

v.

SUNDSTRAND DATA CONTROL, INC.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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STATEMENT PURSUANT TO RULE 29.1

Sundstrand Data Control, Inc. has Sundstrand Corporation as its parent corporation and has no nonwholly owned subsidiaries.

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STATEMENT OF THE CASE

1. Introduction

The patents involved in the present case relate to the detection of windshear and were issued by the Patent Office for relatively minor contributions in an already established art. The applications for those patents were carefully phrased, and limited by the applicant in order to avoid the prior art,[1] which, by that time, contained both

[1] "Prior art" refers to the state of the art at a time prior to the invention being considered. It is the benchmark against which the invention's patentability and scope are evaluated.

horizontal windshear detectors and vertical (microburst) windshear detectors.[2] In fact, very specific representations were made to the Patent Office by the applicant concerning the intended scope of the patents in view of the prior art. In the absence of those crucial representations, the patents would not have been allowed. Thus, it became clear that the patents would always be given a restricted scope.

Despite this, after the patents issued, the patent owner, petitioner here, characterized itself in the marketplace and in the courts as a "pioneer" in the field, as if it had invented the basic principles of windshear detection. Even in seeking to enforce its patents, petitioner acted as if it had invented, and its patents covered, the basic principles of horizontal and vertical windshear detection. Petitioner did so despite the clear teachings of the prior art and the specific limitations that it included in the patents to avoid that prior art.

Respondent began manufacturing a windshear detection circuit which was based upon the prior art, not petitioner's patents. Petitioner charged respondent with patent infringement anyway, asserting that its patents broadly covered the concepts of horizontal and vertical windshear detection. The district court rejected petitioner's unsupported assertions, finding "that the patents are not pioneer patents in the field of windshear equipment." (A28). The court went on to give the patents their proper,

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[2] "Windshear detectors" in general employ simple mathematical relationships to sense changing wind conditions in the immediate vicinity of an aircraft. "Horizontal" windshear detection refers to the detector's ability to sense a component of changing winds along the longitudinal axis of the aircraft, and "vertical" windshear detection refers to the detector's ability to sense a vertical component of the changing winds.

limited scope and then held that respondent's equipment did not infringe. The district court's decision was affirmed by the Federal Circuit.

2. The Patents

a. The First Patent

In 1975, Petitioner Safe Flight Instrument Corporation ("Safe Flight") filed the application for the first patent, U.S. Patent 4,012,713 (what Safe Flight calls the "horizontal" windshear patent). While pending before the Patent Office, the claims of the application were initially rejected, primarily over prior art which had been developed by The Boeing Company ("Boeing").[3] In essence, the basic principle of windshear detection which was employed both by Safe Flight and in the Boeing prior art, as well as in other prior art, involves generating a "windshear signal" that, in some fashion, provides a comparison between the rate of change of airspeed of the aircraft ("airspeed rate") and the horizontal inertial acceleration (rate of change of groundspeed) of the aircraft. There are many different ways of generating such a signal.

In the Boeing prior art, described in U.S. Patent 3,892,374, the windshear signal is generated *directly* from an air-

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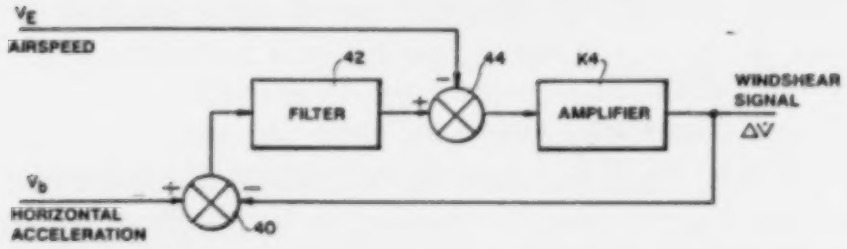
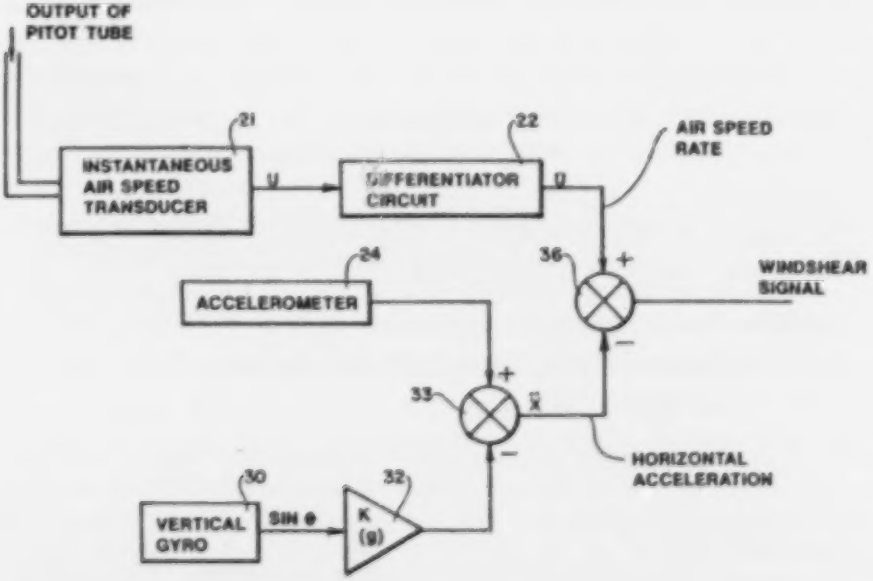
[3] A patent consists of two basic sections—the claims and the specification. The claims are required by statute to "particularly point[ ] out and distinctly claim[ ] the subject matter which the applicant regards as his invention." 35 U.S.C. § 112. They define the extent of the claimed property right. In contrast, the specification should contain "a written description of the invention, and the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same, and shall set forth the best mode contemplated by the inventor of carrying out his invention." 35 U.S.C. § 112.

speed input and an inertial acceleration input; *no* airspeed rate signal is generated in the process[4]:



By contrast, in the system shown in both of Safe Flight's patents, an intermediate airspeed rate signal *is* generated. The means for generating that signal is a "differentiator circuit"[5]:



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[4] This diagram is from Figure 4 of two Boeing prior art patents, U.S. Patent 3,892,374 and U.S. Patent 3,955,071, the latter being entitled "Windshear Detection System."

[5] This diagram is from Figure 2 of Safe Flight's first patent, U.S. Patent 4,012,713.

Safe Flight focused on its generation of a discrete *airspeed rate* signal and made the following amendment to claim 1 of the first patent in order to overcome the Patent Office rejection[6]:

> 1. (Amended) A system for generating a windshear signal [in accordance with] representing the windshear condition encountered by an aircraft comprising:
>
> means for generating a signal [in accordance with] representing the rate of change of the instantaneous airspeed of the aircraft,
>
> means for generating a signal [in accordance with] representing the horizontal inertial acceleration of the aircraft,
>
> means for subtracting the [second mentioned] horizontal inertial acceleration signal from the [first mentioned] rate of change of instantaneous airspeed signal to provide [an output] a windshear signal [in accordance with] representing windshear, and
>
> means for processing said [output] windshear signal to provide an indication [in accordance with] representing the magnitude [of said windshear signal] thereof.

In support of the above amendment, Safe Flight argued that the signal of the Boeing prior art was merely "a function of" windshear and not "representative" of windshear. It argued that the original phrase "in accordance with" could reasonably be interpreted to mean "a function of,"

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[6] It is standard practice in claim amendments to enclose in brackets the deleted portions and underline the inserted portions.

rendering the claim unpatentable over the Boeing prior art. Safe Flight further argued that the substituted term "representing" could *not* be interpreted so broadly. In plain terms, Safe Flight's argument was that a signal can be "a function of" multiple variables, as in the Boeing prior art, but it can "represent" only a *single* variable, such as airspeed rate in its system.

Through these arguments, Safe Flight limited its claim by assigning a specific meaning to the phrase "signal representing" which is used throughout the claim. The meaning chosen by Safe Flight was based upon the specification of the Safe Flight patent application which, unlike the Boeing prior art, described an intermediate signal representing only airspeed rate from which was subtracted a signal representing only inertial acceleration in order to generate a windshear signal.

The similarities between the Boeing prior art and Safe Flight's "invention" cannot be overemphasized. Both use similar components (filters and summing devices) operating on the same inputs (airspeed and inertial acceleration) to produce the same signal (a windshear signal representing the difference between airspeed rate and inertial acceleration). In the Safe Flight system, however, there is a means for generating an intermediate signal representing only airspeed rate. Based upon Safe Flight's representations, the Patent Office found Safe Flight's arguments in support of a claim to its particular configuration to be persuasive. However, it issued the patent only with the specific claim limitations which were incorporated by amendment. The fact remains that the very essence of Safe Flight's "invention"—indeed, the only difference between it and the prior art—is the means for generating an intermediate airspeed rate signal. Safe Flight cannot now claim to the contrary.

b. The Second Patent

Safe Flight's second patent, U.S. Patent 4,079,905 (what Safe Flight calls the "vertical" or "microburst" windshear patent), was based upon and included all of the elements and limitations of the first patent, but it also included another signal, called a "downdraft drift angle" signal, which was set forth in claim 1:

> 1. A system for generating a wind shear signal representing the wind shear condition encountered by an aircraft modified by the downdraft drift angle of the aircraft, comprising:
>
> means for generating a signal representing the rate of change of the instantaneous airspeed of the aircraft,
>
> means for generating a signal representing the horizontal inertial acceleration of the aircraft,
>
> means for generating a signal representing the downdraft drift angle of the aircraft,
>
> means for subtracting the horizontal inertial acceleration signal from the rate of change of instantaneous airspeed signal and adding the downdraft drift angle signal to the rate of change of instantaneous airspeed signal to provide an output signal representing wind shear modified by aircraft downdraft drift angle, and
>
> means for processing said output signal to provide an indication representing the magnitude thereof.

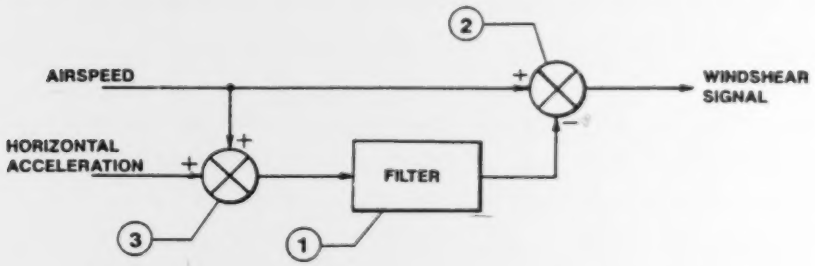
Safe Flight's second patent required means for generating *the same* intermediate airspeed rate signal as the first patent. Safe Flight made this perfectly clear to the Patent Office by again using exactly the same claim language as it had used in amending the application resulting in the first patent (the '713 patent):

> means for generating a signal representing the rate of change of the instantaneous airspeed of the aircraft,
>
> means for generating a signal representing the horizontal inertial acceleration of the aircraft,
>
> * * *
>
> means for subtracting the horizontal inertial acceleration signal from the rate of change of instantaneous airspeed signal . . . .

Any doubt that the second patent (the '905 patent) should be limited to require an intermediate airspeed rate signal and a specific means for generating that signal was removed when Safe Flight filed a paper with the Patent Office distinguishing its claimed invention over the prior art. In that paper, Safe Flight made the *same* arguments to the *same* Patent Office Examiner with respect to the *same* Boeing prior art as it made during the pendency of the first patent. As the district court accurately stated: "Safe Flight made arguments to the Patent and Trademark Office (the "PTO") in its prosecution of the '905 patent which were identical to arguments made to the PTO to distinguish the '713 patent over the prior art." (A7). Safe Flight simply took every step to ensure that the language used in the second patent was given the *same* meaning as it was when used in the first patent. Safe Flight cannot now claim to the contrary.

3. The Accused Devices

The windshear detection equipment made by Respondent Sundstrand Data Control, Inc. ("Sundstrand") does not, in any sense, have an intermediate airspeed rate signal. It does not have a means for generating such a signal, and it does not use such a signal. Rather, Sundstrand's equipment, like the Boeing prior art, generates a windshear signal *directly* from an airspeed input and an inertial acceleration input. This is shown by the diagram prepared by Safe Flight's own expert to illustrate the Sundstrand devices:



The Sundstrand equipment combines *ordinary* airspeed with horizontal acceleration and passes that combination through a common filter. This circuit was specifically chosen by Sundstrand to obtain the enhanced performance of common filtering. In fact, an approach like Safe Flight's was considered by Sundstrand but was rejected because of its inferior performance.

Like the Boeing prior art, the Sundstrand equipment completely lacks any "means for generating a signal representing the rate of change of the instantaneous airspeed of the aircraft" which is required by each and every claim of both Safe Flight patents. Also like the Boeing prior art, the Sundstrand equipment lacks any "means for subtracting the horizontal inertial acceleration signal from the

rate of change of instantaneous airspeed signal." This is also required by each and every claim of both Safe Flight patents.

4. The Decisions Below

After holding that there was no literal infringement, the district court further held that Sundstrand did not infringe Safe Flight's patents under the doctrine of equivalents for at least two reasons. First, the district court held that the Sundstrand devices did not perform substantially the same function in substantially the same way to obtain the same result as the claimed inventions because certain specific functions claimed by Safe Flight were not *at all* performed in the Sundstrand devices. It was impossible for Safe Flight, the court or anyone else to identify the claimed functions, either exactly *or equivalently* in the accused devices. Second, the court properly held that the prosecution histories of *both* patents precluded Safe Flight from expanding its claims to cover the Sundstrand devices. The court held that Safe Flight was bound by the representations that it made to the Patent Office concerning the meanings of critical claim limitations.

The district court's analysis of infringement under the doctrine of equivalents conformed to the analysis applied in all patent cases, regardless of the technical subject matter.[7] The court first examined the claims of the patents

[7] Safe Flight devotes a significant portion of its petition to explaining the ways in which signals may be combined in electronic devices, suggesting that electronics patents should be subject to a different analysis under the doctrine of equivalents. (Pet. 17-22). The argument, however, rings hollow because, in contrast to Safe Flight's broad hypotheticals, the patents in *this* case were properly construed narrowly in light of the close prior art and the representations made by Safe Flight to the Patent Office.

and reviewed the events in the Patent Office leading to those claims, including the applicant's efforts to distinguish the claims over the prior art. From this, the court considered whether the inventions were of a pioneering nature, and it concluded that they were *not* pioneer inventions. The court then sought to determine whether Safe Flight, in asserting its patents against Sundstrand, was trying either to overreach through a scope of protection broader than it was entitled to, given the nature of its invention, or to recapture coverage that it surrendered in order to get the patents in the first place. The district court concluded that Safe Flight was guilty on both counts.[8]

Seeing no clear error in the district court's reasoning, the Federal Circuit affirmed "on the basis of the opinions below." (A2). Safe Flight's criticism of the opinions below amounts only to a criticism of the law and the facts. However, under the law as it is and on the facts as they are, the Federal Circuit was correct in affirming the district court.

REASONS FOR DENYING THE WRIT

The two questions presented by the petition are inappropriate in this case because they are founded on erroneous characterizations of the facts in this case and of the

[8] The district court was not taken by Safe Flight's simplistic equivalence argument. That argument, repeated in the petition with A's, B's and C's and a vodka-and-orange juice cocktail analogy (Pet. 17-22), fails because it does not take into account the effect of those aspects of the doctrine of equivalents that *limit* its reach and that were applied properly in this case.

decision of this Court in *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 339 U.S. 605 (1950). As for Safe Flight's Question 1, the Federal Circuit has not provided a "blueprint for circumventing patent protection," nor has it said anything that does not explicate and reinforce *Graver Tank*. The decision of the district court, affirmed by the Federal Circuit, is fact specific on interpreting the claims of the Safe Flight patents and has no impact on "devices such as computers, compact disc players, and those used in satellite technology, cable television, and a vast array of other industries." (Pet. i).

As for Safe Flight's Question 2, the "restrictions conceded in order to support the patentability" of the claims of the second patent are contained in the prosecution histories of both the first patent and the second. The purported facts on which petitioner's "question" is based are simply wrong. Moreover, it would be contrary to this Court's precedent to review the non-infringement holding of the Federal Circuit by comparing "the 'innovative concept' which the overall patent describes," rather than the patent claim, to the accused devices. (Pet. i).

Certiorari is inappropriate in this case. In *Pennwalt Corp. v. Durand-Wayland, Inc.*, 833 F.2d 931 (Fed. Cir. 1987) (en banc), *cert. denied*, 485 U.S. 961 (1988), this Court recently declined to review precisely the question that Safe Flight is attempting to present as its Question 1. On the facts, *Pennwalt* is virtually indistinguishable from the present case. The Federal Circuit—the court created by Congress to bring consistency and coherence to patent law—has repeatedly held that infringement under the doctrine of equivalents is only made out when *each* element of a patent claim is found in an accused device, either exactly or *equivalently*. This unbroken line of Federal Circuit cases, including *Pennwalt* and the present

case, does not conflict with *Graver Tank* or any other decision of this Court. Rather, it is consistent with and compelled by this Court's precedent.

Finally, the result reached by the Federal Circuit is, in any event, required by the settled doctrine of prosecution history estoppel. This doctrine precludes a patentee from recapturing, through equivalence, coverage given up during prosecution. Safe Flight's attempt to create an issue of the district court's proper application of this doctrine, as its Question 2 presented here, is founded on an utter misstatement of the facts of this case.

A. This Court Has Already Declined To Review The Question Presented Here

The question presented here was recently presented in *Pennwalt*, and this Court declined to review it. There the petition criticized application of an element-by-element analysis under the doctrine of equivalents, asserting that this Court's precedent mandated a comparison of the accused device to the claimed invention "as a whole."

In *Pennwalt*, the patent claims were initially rejected in view of the prior art. They were then amended to include specific functional limitations to distinguish them over the prior art. Those limitations were crucial to patentability. The accused device in *Pennwalt* did not satisfy those limitations, either exactly or equivalently, and was thus held not to "function in substantially the same way as the claimed invention." 833 F.2d at 937.

This is precisely what happened in the present case. And the reasons for denying the writ in *Pennwalt* apply with equal force here.

B. The Federal Circuit's Ruling Does Not Conflict With *Graver Tank*

In an effort to create a conflict between the Federal Circuit's ruling and a decision of this Court, Safe Flight quotes *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 339 U.S. 605, 608 (1950), for the proposition that, under the doctrine of equivalents, "a patent is infringed by *any* device that 'performs substantially the same function in substantially the same way to obtain the same result' " as the patented invention. (Pet. 9) (emphasis added). This, according to Safe Flight, means that the claim language carefully chosen by the patentee to define the scope of its claimed property right in the crucible of Patent Office prosecution can be freely cast aside in favor of what it believes is the " 'innovative concept' which the overall patent describes." (Pet. i). Safe Flight then argues that it was improper, under *Graver Tank*, for the district court in applying the doctrine of equivalents to hold that "a court cannot merely view an invention as a whole, rather it must perform an element-by-element analysis of the patent in suit and must find that each element in the claimed invention, or its equivalent, is found in the alleged infringing product." (Pet. 16). But that is the law of *Graver Tank*.

In *Graver Tank* this Court certainly did not grant to all patentees, in the name of equity, the license to expand the scope of their claims without limit, to cover "any device" in complete disregard of the express language carefully chosen to define the scope of the property right, language that was approved by the Patent Office. Nothing in *Graver Tank* suggests that the only way that a court can "temper unsparing logic" is to "view an invention as a whole," and therefrom make some abstract and baseless

determination whether infringement has occurred. *Graver Tank* totally sanctions the district court's analysis in comparing a patent claim, element-by-element, with an accused device and requiring that each claim element, if not exactly found, at least be *equivalently* found in the accused device in order to find infringement under the doctrine of equivalents.

Moreover, *Graver Tank* itself requires an element-by-element analysis. The patent claim at issue there was for a welding flux that was "essentially a combination of alkaline earth metal silicate and calcium fluoride." 339 U.S. at 610. Two elements were required. The accused composition, however, used a silicate of manganese, which is not an alkaline earth metal, in place of the first claimed element. The question addressed by this Court was

> whether the substitution of the manganese which is not an alkaline earth metal for the magnesium which is, under the circumstances of this case, and in view of the technology and the prior art, is a change of such substance as to make the doctrine of equivalents inapplicable; or conversely, whether under the circumstances the change was so insubstantial that the trial court's invocation of the doctrine of equivalents was justified.

Id. This Court in *Graver Tank* thus performed an element-by-element analysis, not losing sight of the express limitations of the patent claim.

In an unbroken line of cases since its inception in 1982, the Federal Circuit has consistently and continually upheld the doctrine of equivalents as announced by this Court. And claim limitations have always been fundamental in applying the doctrine. Sitting en banc, the Federal Circuit in *Pennwalt* emphasized the importance of claim limitations:

> Under the doctrine of equivalents, infringement *may* be found (but not necessarily) if an accused device performs substantially the same overall function or work, in substantially the same way, to obtain substantially the same overall result as the claimed invention. That formulation, however, does not mean one can ignore claim limitations.

833 F.2d at 934-35 (citing *Graver Tank, inter alia*) (footnote omitted). Indeed, without giving meaning and purpose to the claim limitations used, there remains nothing on which the public can rely to avoid infringement. To permit a patentee to nebulously characterize its invention "as a whole" for purposes of pursuing infringers would usurp the statutory requirement that the specification of a patent "conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention." 35 U.S.C. § 112, second paragraph. It would be unprecedented in property law in that it would establish a property right without bounds and without definition.

In essence, Safe Flight's argument reduces to the proposition that it wishes that the Patent Act and the controlling precedent of this Court and the Federal Circuit were different than they are. This is not a basis for certiorari.

C. The True Facts Of This Case Render Certiorari Inappropriate

Even if Safe Flight's theories on the doctrine of equivalents had some merit, which they do not, consideration of them by this Court in this case is not warranted. It is well settled that *in any event* the doctrine of equivalents is limited by "prosecution history estoppel" in that the doctrine will not allow the patentee to recap-

ture through equivalence certain coverage given up during prosecution. *Exhibit Supply Co. v. Ace Patents Corp.*, 315 U.S. 126, 136-37 (1942); *Loctite Corp. v. Ultraseal Ltd.*, 781 F.2d 861, 870 (Fed. Cir. 1985). "The estoppel applies to claim amendments to overcome rejections based on prior art *and to arguments* submitted to obtain the patent." *Hughes Aircraft Co. v. United States*, 717 F.2d 1351, 1362 (Fed. Cir. 1983) (citations omitted) (emphasis added). And Safe Flight does not quarrel with this accepted principle. (Pet. 13). Here, Safe Flight made claim amendments and arguments to the Patent Office Examiner, while prosecuting its patents. As the district court held, those amendments and arguments now prohibit Safe Flight from expanding the claims of *either* of its patents to cover the Sundstrand devices.

Grossly mischaracterizing the facts of the case, Safe Flight argues that the Federal Circuit improperly used the prosecution history of Safe Flight's first patent (the '713 patent) to narrow the scope of its second patent (the '905 patent). (Pet. 25). Were such a practice to be followed, it might very well be improper, but that is not what happened here. Rather, the arguments made to the Patent Office by Safe Flight during the prosecution of its *second patent* were held to be *independent* grounds for prosecution history estoppel to the enforcement of the second patent.

In the words of the district court:

> Moreover, we reject Safe Flight's arguments that there is a dispute as to whether the '905 patent [the second patent] is infringed. The '905 patent comprises the same windshear detection elements of the '713 patent [the first patent], with the addition of a downdraft drift angle. Safe Flight made arguments to the Patent and Trademark Office (the "PTO") in its prosecution of the '905 patent which were identical to

> arguments made to the PTO to distinguish the '713 patent over the prior art. As such, these arguments are part of the prosecution history estoppel of the '905 patent even though, because of the amendments already made to obtain the '713 patent, the claims of the '905 patent did not have to be modified by successive applications to the PTO. The arguments presented to the PTO limit the scope of the '905 patent and the range of equivalents to be afforded to it in the same manner that the '713 patent is limited. Thus, neither patent is afforded a wide range of equivalents. We find, therefore, no merit in Safe Flight's contention that there is a dispute as to whether the '905 patent is infringed.

(A6-7) (citations omitted).

By accusing the district court of using the prosecution history of the first patent to narrow the scope of the second, and by basing its Question 2 on that false premise, Safe Flight is blatantly ignoring facts of this case that render certiorari inappropriate. Under the true facts, Safe Flight's second "question" is *not* presented here. Certiorari is inappropriate.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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